

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
21,106-s43D BY CARL L. DeVRIES)

The Proposed Findings of Fact, Conclusions of Law and Order as entered by the Hearing Examiner of July 14, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Final Order.

FINAL ORDER

Subject to the conditions and limitations listed below, Provisional Permit No. 21,106-s43D by Carl L. DeVries is hereby granted to appropriate 4.00 cubic feet per second, not to exceed 160 acre-feet per annum from Rock Creek in Carbon County, Montana. The water is to be diverted from Rock Creek at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 21, Township 5 South, Range 21 East, M.P.M., Carbon County, Montana, and conveyed by means of the Highline Ditch, and diverted from said ditch and used for supplemental sprinkler irrigation from May 15 to September 15, inclusive, of each year. The water is to be used on 61 acres in the NW $\frac{1}{4}$, 67 acres in the NE $\frac{1}{4}$, 20 acres in the SE $\frac{1}{4}$ and 17 acres in the SW $\frac{1}{4}$ of Section 15, Township 5 South, Range 21 East, M.P.M., in Carbon County, Montana, for a total of 165 acres, more or less.

2. Provisional Permit No. 21,106-s43D is granted subject to existing rights in the source of supply and any final determination of those rights as provided by Montana law.

3. This Provisional Permit is subject to the authority of court appointed water commissioners, if and when appointed, to measure and

1 distribute to parties using waters in the source of supply, the waters
2 to which they are entitled, including the waters granted in this
3 Provisional Permit. The Permittee shall pay his proportionage share of
4 the fees and compensation expenses, as fixed by the District Court,
5 incurred in the distribution of the waters granted in this Provisional
6 Permit.

7 4. The permittee shall install a suitable headgate or diversion
8 structure at the point the water is diverted from the source of supply.
9 The Permittee shall install an adequate flow measuring device at a
10 suitable place as near as practicable to the point where the water is
11 diverted from the source of supply, in order to record the flow rate and
12 volume of water diverted. The Permittee shall keep a written record of
13 the flow rate and volume of all waters diverted, including the period of
14 time and shall submit said records to the Department upon request.

15 5. The issuance of this Provisional Permit by the Department in no
16 way reduces the Permittee's liability for damages caused by Permittee's
17 exercise of this Provisional Permit, nor does the Department in issuing
18 the Provisional Permit in any way acknowledge liability for damage
19 caused by the Permittee's exercise of the Provisional Permit.

20 NOTICE

21 The Hearing Examiner's Final Order may be appealed in accordance
22 with the Montana Administrative Procedures Act by filing a petition in
23 the appropriate court within thirty (30) days after service of the Final
24 Order.

25 DATED this 30th day of July, 1980.

26
27 *David L. Pengelly*
28 DAVID L. PENGELLY, D. M. R. C.
HEARING EXAMINER

CASE # 21106

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) PROPOSAL FOR DECISION
21,106-s43D BY CARL L. DeVRIES)

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on May 20, 1980, at Red Lodge, Montana, for the purpose of hearing objections to Application for Beneficial Water Use Permit No. 21,106-s43D, David Pengelly, Hearing Examiner, presiding.

The Applicant, Carl L. DeVries appeared at the hearing and presented testimony in support of the Application. Mr. DeVries was not represented by legal counsel. No exhibits were introduced in support of the Application.

Seven witnesses attended the hearing on behalf of the Objector, Rocky Fork Decreed Water Users Association. Those present were Pat Billingsly, Fred Cole, Ron Engel, John Taime, Toyvo Lantta, Everett Zumbrun, and Carl Hanson. Mr. Hanson is the water commissioner on Rock Creek. The Objector was not represented by legal counsel. No exhibits were introduced on behalf of the Objector.

Montana Department of Natural Resources and Conservation personnel present at the hearing were Arlin Krogstad, Hearing Representative, and Vicki Woodrow, Hearings Reporter. The Department introduced one (1) exhibit:

Department's Exhibit:

D-1 Photocopy of aerial photo showing proposed irrigation
project

1 The Department was not represented by legal counsel.

2
3 SUMMARY OF RECORD

4 1. On November 24, 1978, the Department received an Application for
5 Beneficial Water Use Permit No. 21,106-s43D by Carl L. DeVries to
6 appropriate 4.00 cubic feet per second up to 160 acre-feet per annum
7 from Rock Creek in Carbon County, Montana. The water is to be diverted
8 from Rock Creek by means of the Highline Ditch at a point in the SE1/4
9 SE1/4 NW1/4 of Section 21, Township 5 South, Range 21 East, M.P.M.,
10 Carbon County, Montana. The water is to be used for supplemental
11 sprinkler irrigation on 68 acres in the NE1/4, 70 acres in the NW1/4 and
12 22 acres in the SE1/4, all in Section 15, Township 5 South, Range 21
13 East, M.P.M., in Carbon County, Montana, for a total of 160 acres, more
14 or less. Water is to be diverted from May 15 to September 15, inclusive,
15 of each year. The water being appropriated is flood water from Rock
16 Creek.

17 2. On June 28th, July 5th and 12th, 1979, the Department caused to
18 be duly published in the Carbon County News, Red Lodge, Montana, notice
19 of Application for Beneficial Water Use Permit No. 21,106-s43D.

20 3. On August 14, 1979, the Department received an objection to the
21 above Application from the Rocky Fork Decreed Water Users Association.

22
23 PROPOSED FINDINGS OF FACT

24 Based on the transcript of the hearing and the information contained
25 in the Department's file on this matter, it is found:

26 1. That the water to be diverted is flood water from the source of
27 supply.

28 2. That the water is to be used for supplemental irrigation on 61

1 acres in the NW1/4, 67 acres in the NE1/4, 20 acres in the SE1/4 and 17
2 acres in the SW1/4 of Section 15, Township 5 South, Range 21 East,
3 M.P.M., for a total of 165 acres, more or less.

4 3. That there are unappropriated waters in the source of supply at
5 times when the water can be put to the use proposed by the Applicant; in
6 the amount the Applicant seeks to appropriate; and throughout the
7 period during which the Applicant seeks to appropriate, the amount
8 requested is available.

9 4. That the rights of prior appropriators will not be adversely
10 affected by the granting of this permit if the permit is conditioned to
11 give the court appointed water commissioner authority to regulate the
12 appropriation of the water granted herein.

13 5. That the Applicant has permission from the owners to use the
14 Highline ditch to convey the water.

15 6. That the proposed means of diversion or construction are
16 adequate.

17 7. That the proposed use of water is a beneficial use.

18 8. That the proposed use will not interfere unreasonably with
19 other planned uses or developments for which a permit has been issued or
20 for which water has been reserved.

21
22 PROPOSED CONCLUSIONS OF LAW

23 1. Section 85-2-311, MCA, 1979, states that "The department shall
24 issue a permit if:

25 1. there are unappropriated waters in the source of supply:

26 a. at times when the water can be put to the use
27 proposed by the applicant;

28 b. in the amount the applicant seeks to appropriate; and

c. throughout the period during which the applicant seeks to appropriate, the amount requested is available;

2. the rights of a prior appropriator will not be adversely affected;
3. the proposed means of diversion or construction are adequate;
4. the proposed use of water is a beneficial use;
5. the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; . . ."

2. It is concluded that there are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant; in the amount the Applicant seeks to appropriate; and throughout the period during which the Applicant seeks to appropriate, the amount requested is available.

3. Section 85-5-101, MCA, 1979, states in part, "The commissioners shall have authority to admeasure and distribute to the parties owning water rights in the source affected by the decree the waters to which they are entitled, according to their rights as fixed by the decree and by any certificates and permits issued under chapter 2 of this title."

4. It is concluded that the Permittee shall be under the jurisdiction of the water commissioner in this area.

5. It is concluded that the rights of prior appropriators will not be adversely affected.

6. It is concluded that the proposed use is a beneficial use.

7. It is concluded that the proposed means of diversion or construction are adequate.

8. It is concluded that the proposed use will not interfere unreasonably

1 with other planned uses or developments for which a permit has been
2 issued or for which water has been reserved.

3 9. Nothing decided herein has bearing on the status of water
4 rights claimed by the Applicant other than those herein applied for, nor
5 does anything decided herein have bearing on the status of claimed
6 rights of any other party except in relation to those rights herein
7 applied for, to the extent necessary to reach a conclusion herein.

8 Based on the Proposed Findings of Fact and Proposed Conclusions of
9 Law, the following Proposed Order is hereby made:

10
11 PROPOSED ORDER

12 Subject to the conditions and limitations listed below, Provisional
13 Permit No. 21,106-s43D by Carl L. DeVries is hereby granted to appropriate
14 4.00 cubic feet per second, not to exceed 160 acre-feet per annum from
15 Rock Creek in Carbon County, Montana. The water is to be diverted from
16 Rock Creek at a point in the SE1/4 SE1/4 NW1/4 of Section 21, Township 5
17 South, Range 21 East, M.P.M., Carbon County, Montana, and conveyed by
18 means of the Highline Ditch, and diverted from said ditch and used for
19 supplemental sprinkler irrigation from May 15 to September 15, inclusive,
20 of each year. The water is to be used on 61 acres in the NW1/4, 67
21 acres in the NE1/4, 20 acres in the SE1/4 and 17 acres in the SW1/4 of
22 Section 15, Township 5 South, Range 21 East, M.P.M., in Carbon County,
23 Montana, for a total of 165 acres, more or less.

24 2. Provisional Permit No. 21,106-s43D is granted subject to existing
25 rights in the source of supply and any final determination of those
26 rights as provided by Montana law.

27 3. This Provisional Permit is subject to the authority of court
28 appointed water commissioners, if and when appointed, to measure and

1 distribute to parties using waters in the source of supply, the waters
2 to which they are entitled, including the waters granted in this
3 Provisional Permit. The Permittee shall pay his proportionate share of
4 the fees and compensation expenses, as fixed by the District Court,
5 incurred in the distribution of the waters granted in this Provisional
6 Permit.

7 4. The Permittee shall install a suitable headgate or diversion
8 structure at the point the water is diverted from the source of supply.
9 The Permittee shall install an adequate flow measuring device at a
10 suitable place as near as practicable to the point where the water is
11 diverted from the source of supply, in order to record the flow rate and
12 volume of water diverted. The Permittee shall keep a written record of
13 the flow rate and volume of all waters diverted, including the period of
14 time and shall submit said records to the Department upon request.

15 5. The issuance of this Provisional Permit by the Department in no
16 way reduces the Permittee's liability for damages caused by Permittee's
17 exercise of this Provisional Permit, nor does the Department in issuing
18 the Provisional Permit in any way acknowledge liability for damage
19 caused by the Permittee's exercise of the Provisional Permit.

20 NOTICE

21 This Proposed Order is offered for the review and comment of all
22 parties of record. The review and comment period shall commence with
23 the service of this Proposed Order and shall end ten (10) days thereafter.
24 No extensions of time for comment will be granted.


25 The Final Order in this matter will be sent to all parties by
26 certified mail.

27 The Department's Final Order may be appealed in accordance with the
28 Montana Administrative Procedures Act by filing a petition in the appropriate

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1 court within thirty (30) days after service of the Final Order.
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3 DATED this 14th day of July, 1980.
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6 DAVID L. PENGELLY, D.N.R.&C.
7 HEARING EXAMINER
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